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A Legal Professional Association

312 Walnut Street, Suite 3100
Cincinnati, Ohio 45202
www.Santen-Hughes.Com

EPA Region 5 Records Ctr.



275779

Charles M. Meyer, Esq.
E-Mail: cmm@santen-hughes.com
Direct Dial: (513) 852-5986

Telephone: (513) 721-4450
Telecopier: (513) 721-7377

February 13, 2001

Craig Melodia
Assistant Regional Counsel
United States Environmental Protection Agency
Region 5 - 77 West Jackson Boulevard
Chicago, IL 60604-3590
Attn: C-14J

Re: Skinner Landfill, West Chester, Ohio

Dear Mr. Melodia:

You have requested that we produce to you certain documents out of the Allocator's preliminary and final reports concerning Acme Wrecking Co.'s ("Acme") alleged activities at the Skinner Landfill. You have also requested a copy of Acme's Initial Comment Brief.

In the discussions and correspondence which you and I have had, I have been led to believe that if we produce these documents to you, that you will keep them confidential and will use them only for purposes of attempting to settle any claims concerning Acme's activities at the Skinner Landfill. Based on this understanding, I am enclosing copies of these documents to you. I trust they are what you are looking for but, if not, let me know what else you require.

As set forth in Acme's Initial Comment Brief, Acme occasionally transported demolition debris from residential structures to the Skinner Landfill in the late 1960's. All the evidence suggests that any deliveries made by Acme during this time period were minimal in terms of frequency and volume. Acme never delivered demolition debris to the Skinner Landfill after the 1960's, and no evidence has ever been produced to suggest otherwise. Nonetheless, based on some unwarranted inferences from the deposition testimony in the ADR process, the Allocator concluded in the Preliminary Allocation Report that Acme disposed of waste at the Skinner Landfill during a 15-year period from 1975 through 1989. As you will see, compelling evidence was presented in Acme's Initial Comment Brief to refute the inferences upon which this conclusion was based. The Allocator acknowledged in the Final Allocation Report that the evidence which we presented was persuasive. He significantly reduced his estimate of the volume of waste that Acme delivered during that time period by using a 5-year

William E. Santen
Charles M. Meyer†*
Charles E. Reynolds
John D. Holschuh, Jr.†
James P. Wersching

C. Gregory Schmidt†
William E. Santen, Jr.
R. Mark Addy
Mark W. Jordan†
William A. DeCenso

Duane A. Boggs
Charles J. Kubicki, Jr.
Sarah Tankersley†

Kenneth R. Hughes (1925-1993)
†Also Admitted in KY
*Also admitted in FL & MA

Craig Melodia
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multiplier instead of the 15-year multiplier he used in the Preliminary Allocation Report. Notwithstanding, the conclusion in his Final Allocation Report still exaggerates Acme's total waste-in amount in that it continues to assume that Acme delivered a significant amount of waste between 1975 and 1989, an assumption that has no basis.

Furthermore, we have made it well-known throughout the ADR settlement process that Acme is a small, privately-held minority business enterprise with approximately 20 employees and annual gross revenues of approximately \$1,000,000-\$3,000,000. We believe that there is a significant "ability to pay" ("ATP") issue with respect to any proposed responsibility or liability. While we have not formally provided any ATP documentation, I wanted to make you aware of the situation because it does impact our ability to resolve this matter.

Sincerely,

A handwritten signature in black ink that reads "Chuck Meyer". The signature is fluid and cursive, with the first name "Chuck" and last name "Meyer" clearly distinguishable.

Charles M. Meyer

CMM:bae
Enc.

c: Acme Wrecking Co. (w/enc.)

ACME WRECKING COMPANY, INC. ("ACME")

Acme is a demolition company located at 3111 Syracuse Street in Cincinnati. It was incorporated in 1964. The company stated that in the 1960s it was a small company that demolished primarily residential structures. It also identified two commercial jobs it had in the late 1960s: (1) a former Procter & Gamble headquarters building; and (2) a former Greyhound bus station. Acme said it would not have used Skinner for these jobs because the debris would have gone to a local landfill. The Skinner log has entries for Acme in the years 1965 - 1968. Acme claimed that it had no reason to believe it used the Skinner site in other years. Acme did not locate any records regarding disposal at Skinner.

Type of Waste. Acme claimed that it would only have taken demolition debris to Skinner and only when it was doing a job in the vicinity of Skinner. It stated that, in the 1960s, all of Acme's operations in the vicinity of Skinner involved only the demolition of residential structures. The debris would consist mainly of wood and concrete. Acme required its customers, the property owners, to remove all interior furnishings prior to demolition. It also claimed that it would never work on a demolition job unless the owner removed any asbestos containing materials first, and that this has been true since the founding of the company. At times, it would subcontract out this work for the owner. Also, Acme claimed that it separated out all metal, including piping and tanks, and sold it to scrap dealers. It never sold scrap metal to Skinner because it could get better prices from others. It identified Frank Adams Company, Mose Cohen, Liberty Scrap and American Scrap as the places it took scrap in the late 1960s. Acme stated it never transported tanks or containers which contained materials. It required the owner to have the container emptied, purged and ventilated. Acme would then cut the tanks into pieces with a torch and take the pieces to scrap dealers. Acme never transported liquids such as paint, paint thinners, or waste oil. The company claimed it did not haul or dispose of asphalt, paint or paint thinners or waste oil. Acme claimed that its trucks were not equipped to haul, and did not haul, liquids or dirt, although some dirt inevitably mixed in with the debris.

It does not appear that Acme performed a thorough investigation into its possible use of the site during years other than 1965 - 1968. Acme limited its investigation to the years 1965 - 1968, the time frame its name appears in the Skinner log. Acme said it had only 4 employees during those years. The chief executive officer, S. John Smith, was the only person interviewed for the questionnaire responses. The other three employees during this time period were drivers who are deceased.

As to Acme's asbestos argument, it is doubtful that a residential demolition contractor in the 1960s was having asbestos removed through an asbestos abatement contractor. Acme's argument that it has always required asbestos removal to be undertaken separately going back to 1964 is based on the recollection of Mr. Smith. While I can believe that Acme has been following this practice for a very long time, I do not believe that on a full discovery record Acme would persuade a federal district court judge that it has done so since 1964.

Asbestos is not required to link Acme to a hazardous substance, however. Residential construction debris contains hazardous substances, as discussed above. The paint alone on demolition debris would contain a hazardous substance. Acme admits to disposing of painted wall board.

Waste-in List for the Preliminary Allocation Report and Recommendations, Skinner Landfill Superfund Site, October 6, 1998

		Amount or	Compaction	Frequency		Years	Solid	Liquid	Solid	Liquid	Response	Solid Waste	
PRP	Source	Capacity	or Multiplier or Divisor	or loads	Wk/Mo/Yr	1 is the default	Sub Total	Sub total	Total Cys	Total Gals	Cost Dollar Credit	In Total	Percentage
	ACME WRECKING Witnesses	15	1	50	1	15	11250					363690	0.0000%
	ACME WRECKING Log	15	1	152	1	1	2280					363690	0.0000%
ACME WRECKING									13530			363690	3.7202%

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Waste-in List in Solid Waste Volume Order for the Preliminary Allocation Report and Recommendations, Skinner
Landfill Superfund Site, October 6, 1998

	Solid	Liquid	Solid Waste		Liquid Waste	
	Waste In	Waste In	In Total	Percentage	In Total	Percentage
Name Of Party	Cys	Gallons	Cys		Gallons	

ACME WRECKING	13530	0	363690	3.7202%	259308	0.0000%
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CONFIDENTIAL

Waste-in List in Liquid Waste Volume Order for the Preliminary Allocation Report and Recommendations, Skinner
Landfill Superfund Site, October 6, 1998

	Solid	Liquid	Solid Waste	Liquid Waste		
	Waste In	Waste In	In Total	Percentage	In Total	Percentage
Name Of Party	Cys	Gallons	Cys		Gallons	

CONFIDENTIAL

ACME WRECKING	13530	0	363690	3.7202%	259308	0.0000%
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ACME WRECKING COMPANY, INC.

Acme Wrecking Company, Inc., ("Acme") submitted a comment brief dated February 10, 1999. I am persuaded by the comment brief that the Preliminary Report's volume entry for Acme Wrecking is too high.

The Preliminary Report converted Skinner log entries into cubic yards for a time period in the late 1960s. It also accepted the testimony of a number of witnesses to which Acme had not responded on a Site nexus but discounted the volume associated with these witnesses.

As to the Skinner log entries, Acme asked that I determine that the waste in question did not contain a hazardous substance, or at least, not all of the time. I addressed the hazardous substance issue in the Preliminary Report and do not intend to revisit the subject here. For example, Acme argued that there was no evidence that the waste it hauled contained painted wall board; it merely acknowledged that the residential structures it demolished may have included painted wallboard. It strains credulity to conclude that residence structures demolished by Acme in the 1960s did not have a drop of paint on them. If Acme believes it can establish that the waste it hauled to the Skinner site did not contain a hazardous substance, it should pursue the litigation.

Acme also sought relief on the grounds that not all of its loads may have been full. I addressed this matter in the Preliminary Report as a generic protocol and see no reason to make a change here.

I did not conclude that Acme's demolition waste contained asbestos. I simply expressed the view that it is unlikely that Acme had its customers remove asbestos waste in the 1960s. Further discovery would be required to determine the presence of asbestos in the waste hauled to the Site by Acme.

Acme has reacted more persuasively to the testimonial evidence that was relied upon in the Preliminary Report to give Acme 11,250 cys of solid waste. I do believe that this figure should be reduced.

In the Preliminary Report, I recited the testimony of disposal by Acme at the Site. The time period covered by the testimony was 1975 to 1989. I used this 15 year period to compute a volume for Acme in the absence of any countervailing testimony, although I did reduce the volume. While I used a 15-year multiplier, I did not regard the evidence as necessarily meaning that Acme used the Site every year for 15 years. The time period was a component of an equation to derive a volume in a convenient way. The point is that Acme was described as a Site user beyond the late 1960s and 11,250 cys were used to quantify the testimony that covered a long period of time.

Acme has now submitted an affidavit from a witness who says he reviewed all of Acme's files from 1968 forward and could find no evidence of the use of the Site after 1968. He lists the landfills that were used. More significantly, Acme has analyzed the testimony and has suggested that a witness' description of "Acme" might not be referring to Acme Wrecking but to Acme Construction. Acme noted that Rodney Miller himself, later in his deposition, made

reference to an Acme Construction. Acme Wrecking is unrelated to Acme Construction. Acme also explained that linking its name to someone with a 60 cys trailer (as Rodney Miller did) has to be erroneous since it has never owned 60 cys trailers. (Acme also argued it was not present in the Skinner log after 1968 but I do not find that argument persuasive for reasons expressed in the Preliminary Report regarding the log. It also relied on Elsa Skinner's deposition to support its position, but I do not find Elsa Skinner's testimony to be helpful, much less, dispositive here.)

I am concerned that there may be witness confusion here as well. I cannot ignore the testimony that was given in reference to Acme Wrecking and maintain consistency with the treatment of other parties, but I am convinced by Acme's submission, as late as it may be, that the volume in the Preliminary Report is too high. I have decided to reduce Acme Wrecking's testimonial volume – in effect to use a multiplier of 5 years, not 15 years as the means to get a waste volume from testimony – to 3,750 cys. Hence, Acme's revised waste-in amount is 6,030 cys.

Final Allocation Recommendations in Alphabetical Order, Skinner Landfill Superfund Site, April 12, 1999

	Solid	Liquid	Solid Waste		Liquid Waste		Solid	Liquid	Owner/	Rest of	
	Waste In	Waste In	In Total	Percentage	In Total	Percentage	Waste	Waste	Operator	Chem-	Total
Name Of Party	Cys	Gallons	Cys		Gallons				& Part of	Dyne	
			372906		262252				Chem-Dyne		
ACME WRECKING	6030	0	372906	1.6170%	262252	0.0000%	0.16%	0.00%			0.16170%

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI

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THE DOW CHEMICAL COMPANY, et al.	:	Case No. C-1-97-0307
	:	
Plaintiffs	:	(ADR Proceeding)
	:	
vs.	:	INITIAL COMMENT BRIEF OF
	:	DEFENDANT ACME
ACME WRECKING CO., INC., et al.	:	WRECKING CO. INC.
	:	
Defendants	:	

I. INTRODUCTION

Pursuant to Section 16 of the First Case Management Order in the above-captioned case, Acme Wrecking Co. Inc. ("Acme") hereby submits its Initial Comment Brief in response to the Allocator's Preliminary Allocation Report and Recommendations ("Preliminary Report"). Acme disputes the recommendations set forth in the Preliminary Report in the following principal respects:

1. Acme disputes the Preliminary Report's determination that Acme transported 50 loads of demolition debris to the Skinner Landfill Superfund Site (hereinafter referred to as "Skinner Landfill," "Skinner," and/or "Landfill") each year between 1975 and 1989. Acme, in fact, did not transport any materials to the Skinner Landfill during that time period.
2. Acme disputes the Preliminary Report's determination that Acme transported a total of 152 loads of demolition debris to the Skinner Landfill between 1965 and 1968. Although Acme does not deny that it transported demolition debris to the Skinner Landfill in the mid- to late-1960s, its dumping activities at the

Skinner Landfill would have been significantly less than 152 loads. Moreover, there is no evidence that any of the demolition debris delivered by Acme contained hazardous substances.

Based on the facts discussed herein, the Affidavit of Schuyler J. Smith which is attached hereto as Exhibit A and incorporated herein by reference ("Smith Affidavit"), and the Affidavit of Terri Leahr which is attached hereto as Exhibit B and incorporated herein by reference ("Leahr Affidavit"), Acme requests that the determinations regarding Acme in the Preliminary Report be revised to more accurately reflect the nature and extent of Acme's activities at the Skinner Landfill.

II. ACME DID NOT DISPOSE OF ANY MATERIAL AT THE SKINNER LANDFILL BETWEEN THE YEARS 1975 AND 1989

The Preliminary Report suggests that Acme delivered 50 loads of demolition debris per year to the Skinner Landfill from 1975 through 1989. (Preliminary Report, Appendix 1, at 6.) This determination is in conflict with the Skinner accounting log, which indicates that Acme paid dumping fees at Skinner only during the years 1965-1968. This determination is also directly refuted by the information contained in the Smith Affidavit and the Leahr Affidavit, and by the deposition testimony of Elsa Skinner-Morgan.

The Preliminary Report speculates that Acme did not perform a thorough investigation into its possible use of the Skinner Landfill during years other than 1965-1968. (Preliminary Report, Appendix 1, at 5.) The truth, however, is that Acme has fully investigated its possible use of the Skinner Landfill for the period 1968-1989. (Leahr Affidavit ¶ 2.) Acme attempted to investigate its use since the time the company was incorporated in 1964, but was unable to locate any records for the years prior to 1968. (Leahr Affidavit ¶ 2.) In the course

of this investigation, Acme reviewed every one of its files for the period 1968-1989. (Leahr Affidavit ¶ 2.) The files which Acme reviewed contain contracts, receipts, dump tickets, and other documentation for every job that Acme performed during that time period. (Leahr Affidavit ¶ 2.) As a result of this search, Acme has compiled a list of all of the landfills to which Acme delivered its demolition debris during the years 1968-1989. This list is contained in the Leahr Affidavit. (Leahr Affidavit ¶ 3.) As the Leahr Affidavit indicates, this extensive and complete search of Acme's records did not reveal a single item relating to the Skinner Landfill. (Leahr Affidavit ¶ 4.) There was not a single letter, contract, dump ticket, invoice, receipt, or any other writing or document which indicates that Acme delivered any materials to the Skinner Landfill or had any other contact with the Skinner Landfill during the years 1968-1989.

This search of Acme's records is complemented by the Affidavit of Schuyler J. Smith, the founder and chief executive officer of Acme. As Mr. Smith explains, Acme was incorporated in 1964. (Smith Affidavit ¶ 2.) Acme transported materials to the Skinner Landfill in the mid- to late-1960s, but only on the rare occasions when it was working on a job near the Skinner Landfill. (Smith Affidavit ¶ 3.) Mr. Smith does not recall Acme ever taking any debris to the Skinner Landfill other than in the mid- to late-1960s. (Smith Affidavit ¶ 7.)

The information contained in the Leahr and Smith Affidavits is substantiated by the Skinner accounting log entry summaries that were sent to Acme prior to the commencement of the pending litigation. The accounting log entries indicate that Acme paid \$25.00 in dumping fees at the Skinner Landfill in 1965, \$215.00 in 1966, \$588.00 in 1967, and \$84.00

in 1968.¹ In total, the accounting log entries indicate that Acme paid \$912.00 in dumping fees at the Skinner Landfill during the years 1965-1968. The accounting log entries indicate that Acme did not pay any dumping fees at the Skinner Landfill in years other than 1965-1968.

The fact that Acme did not use Skinner after 1968 is further substantiated by the deposition testimony of Elsa Skinner-Morgan in the instant case:

Q Now, is there any way to determine whether Acme Wrecking brought waste to the site, other than what is reflected in the log?

A No.

Q You don't know of a way to do that?

A No. I don't think they did.

Q Why is that?

A I would have been told about it, I guess. I would have billed them.

(Elsa Skinner-Morgan depo. (Nov. 19, 1997) at 199.)

Despite this substantial evidence to the contrary, the Preliminary Report suggests that Acme delivered 50 loads of demolition debris to the Skinner Landfill each year from 1975-1989. This conclusion is based on the deposition testimony of various witnesses who claim that they saw Acme's trucks at the Skinner Landfill during that period. However, the testimony of each of these witnesses contains factual assertions which indicate that the trucks which they saw did not belong to Acme.

¹As explained previously, the Leahr Affidavit indicates that Acme was unable to locate any records which indicate that Acme sent materials to the Skinner Landfill in 1968. This statement would seem to be in conflict with the Skinner accounting log, which indicates that Acme did, in fact, pay dumping fees at Skinner in 1968. However, as noted above, Acme's records do not begin until sometime in 1968 and therefore probably do not fully reflect Acme's activities in 1968.

For example, the Preliminary Report appears to place considerable weight on Ray Skinner's testimony that Acme dumped 50 loads per year at Skinner during a ten-year period in the 1970s and 1980s. (Preliminary Report, Appendix 1, at 6.) Mr. Skinner testified that Acme used dump trailers with a capacity of at least 40 to 60 cubic yards. (Ray Skinner depo. (Feb. 17, 1998) at 906.) Rodney Miller, who testified that he saw Acme trucks at the Landfill during a five-year period in the late 1970s and early 1980s, similarly testified that the trucks which he thought belonged to Acme were 60-cubic yard trailers. (Rodney Miller depo. at 56.) However, as the Smith Affidavit indicates, Acme has never owned 40- to 60-cubic yard trailers, or any trailers even close to that size. (Smith Affidavit ¶ 8.) Acme did not purchase its first 30-cubic yard trailers until the late 1980s, and Acme has never had a trailer larger than 30 cubic yards to this day. (Smith Affidavit ¶ 8.) Whatever Mr. Skinner and Mr. Miller may have seen, it is clear that they did not see trucks which belonged to Acme.

Rodney Miller's deposition testimony contains an interesting remark which may explain why certain witnesses claim to have seen "Acme" trucks at the Skinner Landfill. In response to questions by the Allocator, Mr. Miller stated that he saw "Acme" trucks at the Skinner Landfill. (Rodney Miller depo. at 53.) However, later in the deposition, Mr. Miller stated that the trucks which he saw were connected with "Acme Construction":

Q . . . Do you know anything about Procter & Gamble?

A It would be connected with Acme Construction, if it was anything came out to Skinners'.

(Rodney Miller depo. at 180 (emphasis added).)

In the late 1970s and early 1980s, the period covered by Rodney Miller's testimony, there was a company in Cincinnati doing business under the name of "Acme Construction

Products, Inc." This company was located at 1774 Westwood Avenue and had no affiliation whatsoever to Acme Wrecking Co. Inc. (Smith Affidavit ¶ 9.) Indeed, there were a number of companies in Cincinnati between the years 1975-1989 whose names began with "Acme."

For instance, the 1976 Cincinnati City Directory contains listings for the following companies whose names begin with "Acme":

Acme Brick & Stone
5912 Hamilton Avenue

Acme Cleaners
1409 Main Street

Acme Cleaning Service
6106 Ridge Avenue

Acme Construction Products, Inc.
1774 Westwood Avenue

Acme Fast Freight, Inc.
1400 Gest Street

Acme Hardware Co.
112 W. Elder Street

Acme Lock Service
139 E. Court Street

Acme Muffler Service
7444 Vine Street

Acme Odorless Cleaners
4923 Paddock Road

Acme Remodeling & Contracting
1026 Clearbrook Drive

Acme Sash & Door
1250 Tennessee Avenue

Acme School Supply
1242 W. Mehring Way

Acme Service Co.
2212 Gilbert Avenue

Acme Telephone Answering Service
226 E. 8th Street

Acme Tinning & Lead Coating
1126 Marshall Avenue

Acme Typewriter Service
16 Court-Ninth Arcade

Acme Wrecking Co.
3111 Syracuse Street

The 1976 Cincinnati Suburban Directory contains the following listings under the name "Acme":

Acme Millwright Co.
8560 Voorhees Lane

Acme Research Products
5242 Crookshank Road

Acme Upholstering & Decorating Co.
7132 Montgomery Road

There were similarly a large number of companies doing business under the name "Acme" during the later years of Acme Wrecking's alleged presence at Skinner. For instance, the 1985 Cincinnati City Directory lists the following:

Acme Cleaners
1409 Main Street

Acme Cleaning Service
6106 Ridge Avenue

Acme Construction Products, Inc.
1774 Westwood Avenue

Acme Glass Co., Inc.
537 Livingston Street

Acme Lock, Inc.
139 E. Court Street

Acme Remodeling & Contracting
1026 Clearbrook Drive

Acme Sash & Door
1250 Tennessee Avenue

Acme Telephone Answering Service
226 E. 8th Street

Acme Tinning & Lead Coating
1126 Marshall Avenue

Acme Wrecking Co.
3111 Syracuse Street

The 1985 Cincinnati Suburban Directory contains the following listings:

Acme Cleveland Group
4460 Lake Forest Drive

Acme Fab
11337 Williamson Road

Acme Realty
9864 Belleford Court

Acme Research Products
5242 Crookshank Road

Acme Scale Service
4429 Poole Road

It is conceivable that any of the aforementioned companies could have had vehicles bearing the name "Acme." It is particularly likely that companies such as Acme Construction

Products, Inc., Acme Fast Freight, Inc., and Acme Remodeling & Contracting would have had trucks bearing the "Acme" name. It is very possible that these trucks could have been present at the Skinner Landfill at various times during the 1970s or 1980s, and that witnesses could have seen the name "Acme" and mistakenly assumed that these trucks belonged to Acme Wrecking Co. Inc. This possibility seems very likely when one considers Rodney Miller's testimony in which Mr. Miller, without any prompting, specifically referred to the company as "Acme Construction."

This possibility of confusion and mistaken identity could very well explain the testimony of the other witnesses who claim to have seen "Acme" trucks at the Skinner Landfill between 1975 and 1989. When one closely examines the testimony of these witnesses, one discovers that none of these witnesses specifically linked Acme Wrecking Co. Inc. to the Landfill during those years. Richard Clarke testified that he saw trucks at the Landfill with an "Acme" sign on the side.² Roger Ludwig likewise saw trucks with the word "Acme" on the side and assumed that the trucks belonged to Acme Wrecking Co. Inc.³ Lloyd

²Richard Clarke testified:

- Q Can you describe the vehicle at all?
A Just be a guess.
Q Okay. Well, how do you know it came from Acme.
A Well, the sign.
Q Pardon me?
A The sign was on the side.

(Richard Clarke depo. at 170-71.)

³Roger Ludwig testified:

- Q How do you know they were from Acme Wrecking?
A They would say Acme on it.

Gregory never testified that he actually saw Acme's trucks at the Landfill. He linked Acme to the Landfill by describing off-site activities which Acme does not even perform.⁴

There are perhaps other explanations for the testimony of the witnesses who claim to have seen Acme's trucks at the Landfill between 1975 and 1989. It is possible that some of these witnesses saw Acme's trucks at locations other than the Skinner Landfill, but now mistakenly believe that they were at the Landfill when they saw the trucks. Acme was a growing company in the 1970s and 1980s, and it would not have been uncommon for others in the industry to have seen Acme's trucks at other locations.

In short, there are a number of very plausible explanations for the testimony of the witnesses who claim to have seen "Acme" trucks at the Skinner Landfill between 1975 and

Q So you saw the name?

A And, of course, you've seen Elsa's logs or receipts or something and you would see Acme Wrecking would correspond with that.

(Roger Ludwig depo. at 238-39.)

⁴Lloyd Gregory testified:

Q Okay. Now, how do you know they came from Acme?

A Ray was -- had some work done with them. He was doing some work with them, hauling for them, demolition.

Q For example, how -- did a vehicle come in, a truck come in with demolition waste on it?

A No, no. Ray hauled it in there from Acme.

Q So Ray hauled it?

A For them, yes.

Q How do you know what Ray brought in came from Acme?

A Because they were cleaning the bricks. They had bricks out of an old building they were cleaning.

(Lloyd Gregory depo. at 54.) As noted in the Smith Affidavit, Acme has never cleaned bricks. Acme has always contracted with third parties, generally Star Used Building Material, to clean bricks from Acme's demolition projects. (Smith Affidavit ¶ 10.)

1989. Yet, regardless of what ultimately explains the testimony of these witnesses, the fact remains that they could not have seen trucks which belonged to Acme at the Skinner Landfill between 1975 and 1989. Acme simply did not transport its debris to the Skinner Landfill during those years. The personal recollections of Acme's chief executive officer support this conclusion. Acme's review of its records supports this conclusion. And the Skinner accounting log supports this conclusion.

Acme finds itself in the position of having to prove that it had no involvement at the Skinner Landfill during the years 1975 through 1989. In any context, it is almost impossible to prove that a certain event did not occur. This is particularly true where the events in question allegedly occurred between 10 and 25 years ago, and where there has been no opportunity to directly question the witnesses who claim that the events occurred. However, when one considers as a whole the Smith Affidavit, the Leahr Affidavit, the Skinner accounting log, the fact that certain witnesses linked Acme to the Landfill by describing trucks significantly larger than any trucks that Acme has ever owned, the existence at the same time of numerous other companies which operated under the name "Acme," and the reference by Rodney Miller to a wholly unrelated company, such evidence taken together compels the conclusion that Acme did not have any connection to the Skinner Landfill between 1975 and 1989. There is no logical basis for concluding otherwise. Accordingly, Acme requests that the recommendations in the Preliminary Report be altered to reflect that Acme did not dispose of any waste at the Skinner Landfill during these years.

III. THE PRELIMINARY REPORT OVERSTATES ACME'S LIABILITY FOR ITS ACTIVITIES AT THE SKINNER LANDFILL BETWEEN 1965 AND 1968

The Preliminary Report suggests that Acme delivered 152 loads of demolition debris to the Skinner Landfill between 1965 and 1968. This determination is based upon the Skinner Landfill accounting log, which indicates that Acme paid a total of \$912.00 in dumping fees at the Skinner Landfill during the years 1965 through 1968, and upon the assumption that the dumping fee at the Landfill during those years was \$6.00 per load. The conclusions in the Preliminary Report assume that a full truckload would contain 15 cubic yards, which accurately reflects the capacity of Acme's trucks at that time. (Smith Affidavit ¶ 8.)

Acme was unable to locate any records for years prior to 1968, but concedes that it did transport demolition debris to the Landfill in the mid- to late-1960s. Acme does not, however, concede that the debris which it disposed at the Skinner Landfill contained hazardous substances.

The conclusions in the Preliminary Report are based upon at least two critical assumptions, either or both of which may be inaccurate. First, the Preliminary Report assumes that every single delivery contained a full truckload. Although Acme cannot specifically refute this assumption, it seems that, in fairness, some reduction in Acme's allocation is warranted based on the very logical possibility that at least some of the deliveries contained less than a full truckload. Second, the Preliminary Report also assumes that every load of debris delivered by Acme contained hazardous substances. Yet, no direct evidence has been presented in this action which establishes that Acme ever transported or disposed of hazardous substances at the Skinner Landfill.

Although Acme concedes that it disposed of demolition debris at the Skinner Landfill in the 1960s, there is no evidence that this demolition debris contained hazardous substances. Acme transported materials to the Skinner Landfill only on the rare occasions when it was working on a job near the Skinner Landfill. (Smith Affidavit ¶ 3.) In the 1960s, all of Acme's operations in the vicinity of the Skinner Landfill involved the demolition of residential structures. (Smith Affidavit ¶ 3.) Any debris that was taken to the Skinner Landfill would have come from these residential structures. (Smith Affidavit ¶ 3.)

The demolition debris generally consisted of wood and concrete. (Smith Affidavit ¶ 4.) Acme required the owners of the property to remove all interior furnishings prior to demolition. (Smith Affidavit ¶ 4.) Acme also required the owners to remove any containers containing liquids. (Smith Affidavit ¶ 4.) Acme never transported liquids, such as paint, paint thinners, or waste oil, because its trucks are not designed or equipped to transport liquids. (Smith Affidavit ¶ 4.)

Likewise, Acme never transported tanks or containers which contained materials. (Smith Affidavit ¶ 5.) If Acme discovered any tanks or containers inside a property, they required the owner to have the containers emptied, purged, and ventilated. (Smith Affidavit ¶ 5.) Acme would then cut the tanks into pieces with a torch. (Smith Affidavit ¶ 5.) The remnants were then transported to one of the local scrap dealers. (Smith Affidavit ¶ 5.) Acme never transported scrap metal to the Skinner Landfill because Acme received better prices from other scrap dealers. (Smith Affidavit ¶ 5.) During the late 1960s, Acme transported scrap metal to Frank Adams Company, Mose Cohen, Liberty Scrap, and American Scrap. (Smith Affidavit ¶ 5.)

No evidence has been presented at any stage in this action which indicates that Acme ever transported or disposed of hazardous materials at the Skinner Landfill. The Preliminary Report speculates that the demolition debris delivered by Acme must have contained hazardous substances, but cites no direct evidence in support of this assumption. The Preliminary Report states that Acme "admits" to disposing of painted wallboard. (Preliminary Report, Appendix 1, at 5.) However, Acme has never admitted that it disposed of painted wallboard, or any other hazardous substances, at Skinner. Acme acknowledged in its Questionnaire response that painted wallboard "could have been included in the demolition debris," but that it was unable to either prove or disprove that such material would have been included in the debris that it transported to Skinner. (Acme Responses to Allocator's Follow-Up Questions, #2.)

The Preliminary Report also suggests that asbestos-containing materials were probably included in the debris that Acme transported to Skinner. Again, no direct evidence has been presented to support this conclusion. As the Smith Affidavit explains, it has been Acme's practice since the company was founded to require asbestos-containing materials to be removed from a structure prior to demolition. (Smith Affidavit ¶ 6.) The contract that Acme uses with its customers specifically requires the owner of the property to remove all asbestos-containing materials from the structure prior to demolition. (Smith Affidavit ¶ 6.) In some rare instances, a customer would ask Acme to have the asbestos-containing materials removed as part of the contract. (Smith Affidavit ¶ 6.) In those cases, Acme would contract with an abatement company to remove the asbestos. (Smith Affidavit ¶ 6.) If Acme discovered any

asbestos-containing materials during the course of demolition, Acme would contact the owner and require the owner to remove the asbestos-containing materials. (Smith Affidavit ¶ 6.)

Given the complete absence of any evidence that Acme ever disposed of hazardous substances at the Skinner Landfill, Acme cannot be held liable for any of the remediation costs incurred at the Skinner Landfill. However, even if the Allocator were to find credible evidence that some of the demolition debris transported by Acme contained hazardous substances, some allowance should be given to account for the possibility that some or many of the loads disposed of by Acme did not contain any hazardous substances.

In short, the determinations in the Preliminary Report with respect to Acme's activities between 1965 and 1968 are based upon at least two unsubstantiated assumptions which, in each case, maximize the extent of Acme's liability. No allowance has been made for the legitimate possibility that either or both of these assumptions may be untrue.

Based on the foregoing, Acme requests that the recommendations in the Preliminary Report with respect to Acme's activities at the Skinner Landfill between 1965 and 1968 be revised to indicate that there is no evidence that Acme ever transported or disposed of hazardous substances at the Skinner Landfill, and therefore Acme should have no liability for the remediation costs. In the alternative, Acme requests that the recommendations with respect to such time period be reduced to reflect the following possibilities: (i) some of the loads transported by Acme may not have contained a full 15 cubic yards of debris; (ii) it is possible that none of the loads transported by Acme contained hazardous substances; and (iii) even if some of the loads did contain hazardous substances, it is possible that other loads did not contain any hazardous substances.

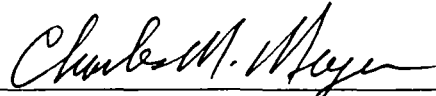
IV. CONCLUSION

The Smith Affidavit, the Leahr Affidavit, the Skinner accounting log, the testimony of Elsa Skinner-Morgan, and the factual analysis contained herein clearly and compellingly demonstrate that Acme did not transport any demolition debris or other materials to the Skinner Landfill in any years other than 1965-1968. In addition, the determination that Acme delivered 152 loads to the Skinner Landfill between 1965 and 1968 is based upon at least two unsubstantiated assumptions which likely exaggerate Acme's dumping activities at Skinner during that time period. Accordingly, Acme Wrecking Co. Inc. respectfully requests that the determinations regarding Acme in the Preliminary Report be revised in the following respects in the Allocator's Final Allocation Report:

1. The Allocator's Final Allocation Report should conclude that Acme did not contribute any waste to the Skinner Landfill other than during the years 1965 through 1968.
2. The Allocator's Final Allocation Report should conclude that Acme did not contribute any hazardous substances to the Skinner Landfill during the years 1965 through 1968, and therefore has no liability for any of the remediation costs. In the alternative, Acme's liability for the years 1965 through 1968 should be based on significantly less than 152 loads, to account for the following possibilities: (i) some of the loads transported to the Landfill by Acme may not have contained a full 15 cubic yards of debris; (ii) it is possible that none of the loads transported by Acme contained hazardous substances;

and (iii) even if some of the loads did contain hazardous substances, it is possible that other loads did not contain any hazardous substances.

Respectfully submitted,

A handwritten signature in cursive script, reading "Charles M. Meyer".

Charles M. Meyer (Ohio Reg. # 0019331)

SANTEN & HUGHES

312 Walnut Street, Suite 3100

Cincinnati, Ohio 45202

(513) 721-4450

Trial Attorney for Defendant

Acme Wrecking Co. Inc.

#128867

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

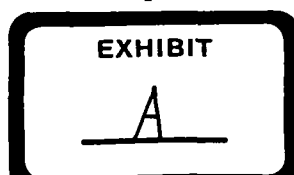
THE DOW CHEMICAL COMPANY, et al.	:	Case No. C-1-97-0307
	:	
Plaintiffs	:	(ADR Proceeding)
	:	
vs.	:	AFFIDAVIT OF SCHUYLER J.
	:	SMITH
ACME WRECKING CO., INC., et al.	:	
	:	
Defendants	:	

The undersigned, Schuyler J. Smith, first being duly cautioned and sworn, does hereby depose and state as follows:

1. I am the founder and chief executive officer of Acme Wrecking Co. Inc. ("Acme"), a Defendant in the above-captioned case. I am over 18 years of age, am under no legal disability, and would be competent to testify to the matters set forth herein if called to do so in open court. I make this Affidavit of my personal knowledge.

2. Acme was incorporated in 1964. Acme is a small, privately-held Ohio corporation with its principal offices located at 3111 Syracuse Street, in Cincinnati, Ohio. Acme is involved in the business of residential and commercial demolition.

3. Acme transported materials to the Skinner Landfill in the mid- to late-1960s, but only on the rare occasions when Acme was working on a job near the Skinner Landfill. In the 1960s, all of Acme's operations in the vicinity of the Skinner Landfill involved the demolition of residential structures. Any debris that was taken to the Skinner Landfill would have come from these residential structures.



4. The demolition debris that Acme transported to the Skinner Landfill generally consisted of wood and concrete. Acme required the owners of the property to remove all interior furnishings prior to demolition. Acme also required the owners to remove any containers containing liquids. Acme never transported liquids, such as paint, paint thinners, or waste oil, because its trucks are not designed or equipped to transport liquids.

5. Acme never transported tanks or containers which contained materials. If Acme discovered any tanks or containers inside a property, we required the owner to have the containers emptied, purged, and ventilated. Acme would then cut the tanks into pieces with a torch. The remnants were then transported to one of the local scrap dealers. Acme never transported scrap metal to the Skinner Landfill because Acme received better prices from other scrap dealers. During the 1960s, to the best of my recollection, Acme transported scrap metal to Frank Adams Company, Mose Cohen, Liberty Scrap, and American Scrap.

6. To the best of my recollection, it has been Acme's practice since the company was founded to require asbestos-containing materials to be removed from a structure prior to demolition. The contract that Acme uses with its customers specifically requires the owner of the property to remove all asbestos-containing materials from the structure prior to demolition. In some rare instances, a customer will ask Acme to have the asbestos-containing materials removed as part of the contract. In those cases, Acme contracts with an abatement company to remove the asbestos. If Acme discovers any asbestos-containing materials during the course of demolition, Acme contacts the owner and requires the owner to remove the asbestos-containing materials.

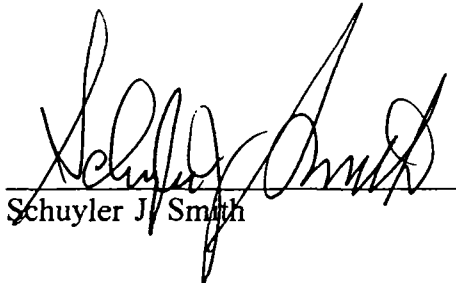
7. To the best of my recollection, Acme never transported any debris from its demolition operations to the Skinner Landfill other than in the mid- to late-1960s.

8. Acme has never owned 40- to 60-cubic yard trailers. Acme did not purchase its first 30-cubic yard trailers until the late-1980s. Acme has never had a trailer larger than 30 cubic yards. In the 1960s, the only trucks that Acme owned were 15-cubic yard tandem dump trucks.

9. I have been told that, in the 1970s and 1980s, there was a company in Cincinnati doing business under the name of "Acme Construction Products, Inc.", located at 1774 Westwood Avenue. "Acme Construction Products, Inc." was not, in any way, affiliated with Acme Wrecking Co. Inc.

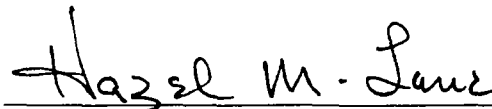
10. Acme has never cleaned bricks as part of its demolition activities. Acme has always contracted with third parties, generally Star Used Building Material, to clean bricks from Acme's demolition projects.

FURTHER AFFIANT SAITH NAUGHT.

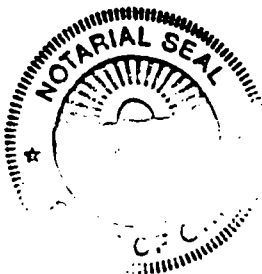

Schuyler J. Smith

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

The foregoing instrument was acknowledged before me this 11 day of February, 1999, by SCHUYLER J. SMITH.


Notary Public

#128999



HAZEL M. LANE
Notary Public, State of Ohio
Commission Expires Jan. 10, 2001

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

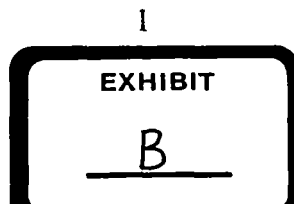
THE DOW CHEMICAL COMPANY, et al.	:	Case No. C-1-97-0307
	:	
Plaintiffs	:	(ADR Proceeding)
	:	
vs.	:	AFFIDAVIT OF TERRI LEHR
	:	
ACME WRECKING CO., INC., et al.	:	
	:	
Defendants	:	

The undersigned, Terri Lehr, first being duly cautioned and sworn, does hereby depose and state as follows:

1. I am employed by Acme Wrecking Co. Inc. ("Acme"), a Defendant in the above-captioned case. I am over 18 years of age, am under no legal disability, and would be competent to testify to the matters set forth herein if called to do so in open court. I make this Affidavit of my personal knowledge.

2. In connection with the ADR proceeding in the above-captioned lawsuit, I reviewed every one of Acme's files for the period 1968-1989. I attempted to locate Acme's files since the time the company was incorporated in 1964, but I was unable to locate any records for the years prior to 1968. The files which I reviewed contain contracts, receipts, dump tickets, and other documentation for the jobs that Acme performed during that time period.

3. While conducting this review of Acme's files, I compiled a list of all of the landfills for which I found records. The following is a year-by-year listing of all of the landfills for which Acme has records:



- 1968 Frank J. Derrick Co., 4560 Kellogg Avenue, Cincinnati, Ohio 45226
- 1969 Frank J. Derrick Co., 4560 Kellogg Avenue, Cincinnati, Ohio 45226
- 1970 H. Hafner & Sons, Inc., 3838 Pennsylvania Ave., Cincinnati, Ohio 45226
- 1971 Rumpke, Inc., P. O. Box 31004, Cincinnati, Ohio 45231
H. Hafner & Sons, Inc., 3838 Pennsylvania Ave., Cincinnati, Ohio 45226
- 1972 Schlichter Co., Inc., 2601 Hamilton-Cleves Road, Hamilton, Ohio 45013
William G. Scott Excavating Co., 4000 Camp Ground Rd., Louisville, KY 40211
H. Hafner & Sons, Inc., 3838 Pennsylvania Ave., Cincinnati, Ohio 45226
- 1973 Elda, P. O. Box 16029, Cincinnati, Ohio 45216
H. Hafner & Sons, Inc., 3838 Pennsylvania Ave., Cincinnati, Ohio 45226
- 1974 Elda, P. O. Box 16029, Cincinnati, Ohio 45216
H. Hafner & Sons, Inc., 3838 Pennsylvania Ave., Cincinnati, Ohio 45226
- 1975 Elda, P. O. Box 16029, Cincinnati, Ohio 45216
H. Hafner & Sons, Inc., 3838 Pennsylvania Ave., Cincinnati, Ohio 45226
- 1976 Elda, P. O. Box 16029, Cincinnati, Ohio 45216
H. Hafner & Sons, Inc., 3838 Pennsylvania Ave., Cincinnati, Ohio 45226
- 1977 Elda, P. O. Box 16029, Cincinnati, Ohio 45216
- 1978 H. Hafner & Sons, Inc., 3838 Pennsylvania Ave., Cincinnati, Ohio 45226
- 1979 H. Hafner & Sons, Inc., 3838 Pennsylvania Ave., Cincinnati, Ohio 45226
- 1980 H. Hafner & Sons, Inc., 3838 Pennsylvania Ave., Cincinnati, Ohio 45226
- 1981 Johner, Inc., 5445 Wooster Pike, Cincinnati, Ohio 45226
- 1982 Johner, Inc., 5445 Wooster Pike, Cincinnati, Ohio 45226
- 1983 Welsh Sand & Gravel, 10217 Columbia Street, Harrison, Ohio 45030
Niehaus Excavating & Grading, 9030 Mt. Hope Road, Harrison, Ohio 45030
Hornsby Sand & Gravel, 7450 Dry Fork Road, Cincinnati, Ohio 45002
R.M. Butler, Box 11059, Cincinnati, Ohio 45242
- 1984 Johner, Inc., 5445 Wooster Pike, Cincinnati, Ohio 45226

- 1985 Johner, Inc., 5445 Wooster Pike, Cincinnati, Ohio 45226
- 1986 Trey Co., 2000 Sandridge Drive, Dayton, Ohio 45439
- 1987 Gray Road Fill, 325 Clark Road, Cincinnati, Ohio 45215
- 1988 James G. Coleman, 2920 E. Galbraith Road, Cincinnati, Ohio 45237
- 1989 Motz, 5055 Wooster Pike
Gray Road Fill, 325 Clark Road, Cincinnati, Ohio 45215

4. During my search of Acme's records for the years 1968-1989, I did not locate a single item relating to the Skinner Landfill.

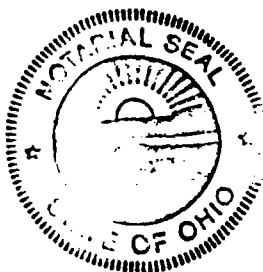
FURTHER AFFIANT SAITH NAUGHT.

Terri Leahr
Terri Leahr

STATE OF OHIO)
) SS:
COUNTY OF HAMILTON)

The foregoing instrument was acknowledged before me this 11 day of February, 1999, by TERRI LEAHR.

Hazel M. Lane
Notary Public



HAZEL M. LANE
Notary Public, State of Ohio
Commission Expires Jan. 10, 2001

#129000